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No. 08-43

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IN THE

Supreme Court of the United States

INTERNATIONAL RECTIFIER CORPORATION,

Petitioner,

v.

IXYS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Rule 3 of the Federal Rules of Appellate Procedure allows a federal court of appeals to construe as a notice of appeal a counseled motion filed 14 days after entry of judgment, which clearly expresses the intent to appeal, and names the appealing party, the judgment being appealed, and the court to which appeal is taken.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, IXYS Corporation states that it has no parent corporation, and no publicly-listed company holds ten percent or more of its stock.

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STATEMENT OF THE CASE

The underlying appeal was the sixth[1] IXYS Corporation (IXYS) has prosecuted and won against International Rectifier Corporation (IR) arising from a pair of related patent-infringement and contempt cases IR filed against IXYS in 2000 and 2001, respectively, in the Central District of California. The erroneous judgment of patent infringement reversed by the Federal Circuit in this case was entered in September 2006 by the Honorable Manuel L. Real. It was the third such judgment, and virtually identical to the second, which Judge Real had entered in February 2006, and the Federal Circuit had swiftly vacated and remanded of its own accord in light of this Court's then-recent decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). *See Int'l Rectifier Corp. v. IXYS Corp.*, 188 Fed. Appx. 1001 (Fed. Cir. 2006). As to each of the two prior judgments, the Federal Circuit had granted IXYS an emergency stay pending appeal based upon IXYS's showing of likely success on the merits. IXYS fully expected the district court to enter a third adverse judgment, fully expected to seek a stay pending appeal, and fully expected that if such relief were granted, it would be granted by the Court of Appeals and not by the district court. Thus, prior to entry of the third

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[1] *See Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d.1353 (Fed. Cir. 2008); *Int'l Rectifier Corp. v. IXYS Corp.*, 188 Fed. Appx. 1001 (Fed. Cir. 2006); *Int'l Rectifier Corp. v. IXYS Corp.*, 361 F.3d 1363 (Fed. Cir. 2004); *Int'l Rectifier Corp. v. Samsung Elecs. Co., Ltd.*, 238 Fed. Appx. 601 (Fed. Cir. 2007); *Int'l Rectifier Corp. v. Samsung Elecs. Co., Ltd.*, 424 F.3d 1235 (Fed. Cir. 2005); *Int'l Rectifier Corp. v. Samsung Elecs. Co., Ltd.*, 361 F.3d 1355 (Fed. Cir. 2004).

judgment, IXYS had formally arranged with IR (in a stipulation entered by the district court) that IXYS would give up a host of equitable defenses in return for IR's agreement not to enforce any injunction for fourteen days while IXYS sought a stay pending appeal in the district court[2] and then (if necessary) in the Court of Appeals. IXYS bargained with IR for the extra time precisely because it knew the motion to stay would not be a routine motion. In fact, the motion would present many of the arguments that eventually persuaded the Court of Appeals to reverse the judgment.

Judge Real entered the third judgment on September 14, 2006, and IXYS filed its motion for stay pending appeal fourteen days later on September 28. IXYS had until October 16, 2006, to file a formal notice of appeal. Unfortunately, the experienced litigation secretary whose office it was to calendar this date was distracted from doing so in the weeks immediately following the filing of IXYS's motion for stay by her doctor's report that a routine mammogram had yielded alarming results, and a diagnosis of cancer, which led to her surgery on October 30, 2006.

IR was not even slightly prejudiced by IXYS's mistake. In fact, IR filed its opposition to IXYS's stay motion a full week after the deadline had passed for IXYS to file a formal notice of appeal, and IR did not even note the lapse had occurred. IXYS's counsel,

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[2] Under the Federal Rules of Appellate Procedure a party may not move in the court of appeals for a stay of injunction unless it has first moved for such relief in the district court. Fed. R. App. P. 8(a)(1)(C).

however, soon realized their error and filed a request for an extension of time to appeal on October 30, 2006, pleading excusable neglect. *See* Fed. R. App. P 4(a)(5). The district court denied this request on December 8, 2006, and IXYS filed a notice of appeal from that denial. While the motion to extend time was pending, however, the district court had denied IXYS's motion to stay the judgment, and IXYS had sought an emergency stay from the Federal Circuit, urging that court to accept jurisdiction based upon the timely notice of an appeal provided by IXYS's September 28, 2006, stay motion. *See* Fed. R. App. P. 3(c). In orders entered in January and February 2007, the Court of Appeals announced it would take jurisdiction based on this alternate form of notice. Accordingly, IXYS did not ultimately pursue its appeal from Judge Real's denial of its motion to extend the time to file a formal notice of appeal.[3]

In its opinion on the merits, the Federal Circuit analyzed the jurisdictional issue as follows:

> In *Smith v. Barry*, the Supreme Court held that "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal."

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[3] That motion and its disposition are not the subjects of this petition. Since IR nonetheless reports the irrelevant fact that Judge Real "found" that IXYS's delay in filing its notice of appeal "was at least in part strategic rather than merely neglectful," IXYS is compelled to report that IR authored these findings, and the district judge, per his custom, simply adopted them. IR had likewise authored most of the findings of fact and conclusions of law IXYS saw vacated or reversed in its five prior appeals.

> 502 U.S. 244, 248-49 (1992). Under Rule 3, an adequate notice must meet three requirements. It must "(A) specify the party or parties taking the appeal . . . ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." Fed. R. App. P. 3(c)(1). IXYS's motion to stay sets forth all three pieces of information: "*[(A)] [D]efendant IXYS Corporation ('IXYS')* will, and hereby does, move the Court for an order staying the execution of *[(B)] its September 14, 2006, Final Judgment and enforcement of the permanent injunction entered on the same date* pending resolution of IXYS's appeal to the *[(C)] Federal Circuit Court of Appeals.*" Mot. to Stay, *Int'l Rectifier Corp. v. IXYS Corp.*, No. 00-CV-6756 (C.D. Cal. Sept. 28, 2006) (Dckt. No. 720 (emphases added). Under *Smith*, both IR and the district court were therefore on notice of IXYS's intent to appeal. We thus construe the motion as a notice of appeal.

Pet. Appx. at 6a-7a.

Having accepted jurisdiction, the Federal Circuit reversed the third judgment of infringement against IXYS. In plain reference to IR's past success at persuading the district court on remand to revive questions already foreclosed on appeal, the court's opinion concluded with this unusual sentence: "There shall be no further proceedings in this case regarding any questions of infringement, either literally or under

the doctrine of equivalents." Pet. Appx. 15a. The Federal Circuit denied IR's petition to rehear the jurisdictional question.

REASONS FOR DENYING THE PETITION

In *Smith v. Barry*, 502 U.S. 244 (1992), this Court held: "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Id.*, 502 U.S. at 248-49. The courts of appeals have had absolutely no trouble interpreting this rule. There is no existing conflict among the circuits, and this case raises none.

IR insists that *Smith* applies only to *pro se* filings, irrelevantly citing case upon case for the uncontested proposition that courts owe special solicitude to uncounseled litigants. From this narrow interpretation of *Smith*, which no court has sponsored, IR spins a *prohibition* on courts' construing counseled filings liberally. But no rule or case has ever expressed this prohibition. (Indeed, this Court itself has interceded to aid a counseled party whose notice of appeal was technically at variance with the Rules.) The strongest support IR can muster for its argument that courts *may not* liberally interpret the filings of counseled parties is language taken from a smattering of pre-*Smith* cases, expressing some circuits' *reluctance* to do so. All of those courts have since acknowledged that *Smith* commands them to reconsider that stance. Even if IR were right (and the courts of appeals were wrong) about the limited reach of *Smith*, at best, IR has shown that courts *need not* construe counseled filings liberally. But "need not"≠"must never." And that is the central fallacy of IR's argument.

This would perhaps be the knotty case IR makes it out to be if it presented the question whether the court of appeals was *obliged* to treat IXYS's motion as a notice of appeal. But this case does not present that question. It presents the question whether the Federal Circuit was *forbidden* to do so. And the answer in view of all of the authority IR cites is: clearly not.

The fact is that this Court has never reversed a federal court of appeals' decision to treat a particular document as a notice of appeal, provided the document was timely filed under Rule 4 *and* provided it set forth the information required by Rule 3. Indeed, the only cases in which the Court has reversed the lower courts' application of the functional-equivalent doctrine have been those in which courts of appeals have *refused* liberal construction to documents that met those Rules' requirements. These reversals have occurred in both counseled and uncounseled cases in service of the principle that the purpose of pleading is not to test the agility of counsel but to "facilitate a proper decision on the merits."

IR's challenges to the adequacy of IXYS's notice are likewise untenable. Indeed, since the Rules' ultimate purpose is practical, it is worth pointing out that IR has never once suggested (in four rounds of briefing) that it did not receive timely written notice of IXYS's intent to appeal the district court's third adverse judgment to the Federal Circuit.

Yet, IR claims IXYS's notice was not sufficient under the Rules. Ignoring some cases altogether and reading others way too closely, IR concludes that the

requirements for giving constructive notice of an appeal are actually much more exacting than those for giving formal notice. IR asserts IXYS's motion was lacking because it did not announce a "present appeal," but merely one that might take place in the future. Pet. at 12-13. It is hard to see, however, how a formal notice of appeal, which must be adequate by IR's standards, does anything more than that. A formal notice, like the notice IXYS provided, announces one side's *intention to appeal* to the opposing side and to the district court. It provides no greater assurance than does a functional notice that the filer will actually *prosecute* an appeal. In any case, no court has ever recognized the distinction IR purports to discern here.

There is absolutely no danger, as IR suggests, that every routine post-judgment motion will create appellate jurisdiction under the standards upheld by the Federal Circuit. Post-judgment motions that convey any kind of jurisdictional mixed message are consistently deemed inadequate to convey notice of an appeal. The Ninth Circuit, for example, has refused to treat a stay motion as a notice of appeal where, by the very same motion, the appellant also asked the district court to rehear the case, a request that plainly invoked the jurisdiction of the district court, not the court of appeals. What IR mistakenly reads as a requirement that the noticing papers show an appeal is being taken right now is actually a requirement that they show the moving party intends to appeal unequivocally. A post-judgment motion is not given effect as a notice of appeal when, instead of showing the intent to appeal, it hints at the wish to avoid appeal by offering the district court a last chance to grant relief that the moving party might

otherwise ask the court of appeals to order on remand. While IR finds the distinction difficult, the courts of appeals have not. Here, IXYS's motion for stay pending appeal plainly expressed the requisite intent. Even by granting the motion, the district court could not have obviated the need for IXYS to appeal. In fact, a stay "pending appeal" is void if no actual appeal is pursued.

This Court has clearly articulated the difference between true jurisdictional impediments to appeal and curable lapses in form. This case presents the latter. IXYS's counsel erred, but they nonetheless provided timely written notice to both IR and the district court that IXYS would appeal the September 14, 2006, judgment to the Federal Circuit. Whether that court was required to recognize IXYS's motion as a notice of appeal, it was certainly allowed to do so. No court, no statute, and no rule has ever suggested otherwise. In sum, this case presents no confusion, no conflict, and no cause to grant the writ.

I. There Is No Support For IR's Claim That Counseled Filings May Not Be Construed Liberally

Most of IR's brief is devoted to proving that *Smith v. Barry* does not apply to counseled filings in civil appeals. While *Smith* itself says no such thing, and more than one court of appeals has flatly held otherwise,[4] this

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[4] *See, e.g., Rodgers v. Wyoming Att'y Gen.*, 205 F.3d 1201, 1205 (10th Cir. 2000) ("[t]he principles outlined in *Smith v. Barry* . . . are not confined to the filings of *pro se* appellants"), (Cont'd)

case does not present that question. The Federal Circuit did not hold that it had no choice but to construe IXYS's stay motion as a notice of appeal. The Federal Circuit held that the "motion . . . me[t] the requirements to *be* a notice of appeal, an inquiry [it recognized was] dependent on *Smith*." Pet. Appx. 8a.

This was hardly radical. As IR conceded when it sought rehearing, "courts [of appeals] had been liberally construing documents [as notices of appeal] since long before" *Smith* explicitly mandated they do so. *See, e.g.*, *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974) (construing petition for leave to appeal as an effective notice, observing "it would . . . be a travesty upon justice . . . to hold the extremely simple procedure required by the [predecessor to Rule 3] is . . . a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights"), *overruled on other grounds*. Yet this Court has never reversed a court of appeals' discretionary decision to treat a particular document as a notice of appeal, provided the document was both timely filed under Rule 4 *and* provided it set forth the information required by Rule 3. In fact, this Court's only reversals have occurred when courts of appeals have *refused* liberal construction to documents that met those Rules' requirements. *See Smith*, 502 U.S. 244

(Cont'd)

overruled on other grounds by Slack v. McDaniel, 529 U.S. 473 (2000); *Haugen v. Nassau County Dept. of Social Services*, 171 F.3d 136, 138 (2d Cir. 1999) (treating as a notice of appeal local government counsel's letter stating "Nassau County Department of Social Services will appeal the judgment in the above referenced matter to the Second Circuit").

(reversing Fourth Circuit's dismissal of an appeal following its misapplication of the "functional equivalent" standard); *Foman v. Davis*, 371 U.S. 178 (1962) (reversing First Circuit's dismissal of an appeal where "the defect in the . . . notice . . . did not mislead or prejudice the respondent.") Those reversals have occurred in both counseled (*e.g.*, *Foman*) and uncounseled (*e.g.*, *Smith*) cases.

IR purports to prove the limited reach of *Smith* by citing old Ninth and Tenth Circuit cases, *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 283 (9th Cir. 1988); *Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989); *Allah v. Superior Court*, 871 F.2d 887 (9th Cir. 1989) and *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563 (10th Cir. 1979), which all refused to extend leniency to counseled parties. But since these decisions all predate *Smith* by years, they not only say nothing about that case, they are all of dubious continuing validity. Indeed, the Ninth Circuit has expressly recognized that *Smith* calls for the reconsideration of much of its precedent in this area. *See, e.g.*, *Andrade v. Attorney Gen'l of Calif.*, 270 F.3d 743, 751 (9th Cir. 2001) ('we must reexamine our holding [that a motion for extension of time to appeal may not be construed as a notice of appeal] in light of the Supreme Court's decision in *Smith v. Barry*"), *rev'd on other grounds*. And the Tenth Circuit has squarely held that "[t]he principles outlined in *Smith v. Barry* . . . are not confined to the filings of *pro se* appellants." *Rodgers*, 205 F.3d at 1205.

Reviewing the specific facts of these cases only strengthens the impression that they are not controlling now. In *Munden*, the Ninth Circuit refused to treat a docketing statement as a notice of appeal, explaining that it would "not extend leniency that is not demanded by [prior] cases to one where the party is represented by an attorney." *Munden*, 849 F.2d at 388; *Allah*, 871 F.2d at 889 (same). Obviously this statement does not square with this Court's later holding that "[c]ourts will liberally construe the requirements of Rule 3." *Smith*, 502 U.S. at 248. Indeed, the Ninth Circuit later said that *Smith* required it to reexamine its holding in *Munden*. *See S.M. v. J.K.*, 262 F.3d 914, 922 (9th Cir. 2001). The Ninth Circuit in *Munden* also explained that "a liberal construction of Rule 3(a)" could not "be allowed to nullify the plain provisions of [Federal Rules of Appellate Procedure] Rule 4(a)(4) that a premature notice of appeal 'shall have no effect.'" *Munden*, 849 F.2d at 388. That plain (draconian) provision of Rule 4(a)(4), however, was deleted by amendment in 1991, leaving *Munden* of dubious effect. *Hollywood*, also decided before *Smith*, and citing as controlling the two *Munden* considerations just analyzed, is also of dubious continuing effect.

Of all the Ninth Circuit cases IR cites, only *S.M. v. J.K.* was decided after this Court decided *Smith*. But, contrary to IR's suggestion, *S.M.* did not turn on the fact that the would-be cross-appellant in that case was counseled. (Indeed, *S.M.* expressly acknowledged that *Smith* brought *Munden* into question.) *S.M.* turned on the fact that she gave the court no reason why it should exercise its discretion in her favor. *Id.*, 262 F.3d at 922 ("[p]laintiff has provided us with no reason that we should exercise our discretion to treat her [Civil Appeals

Docketing Statement] as a notice of cross-appeal"); *id.*, 262 F.3d at 923 ("[t]here is no reason to allow plaintiff to bring her cross-appeal without filing the requisite notice"). IXYS, in contrast, provided the Federal Circuit with a host of reasons why it should exercise its discretion to hear IXYS's appeal.

As for the supposedly controlling Tenth Circuit case, *Century Laminating*, that decision also turned on the pre-1991 version of Federal Rule of Appellate Procedure 4(a)(4), and was also plainly overruled by *Smith*. The Tenth Circuit in that case refused to treat appellant's stay motion as a notice of appeal because he "did not then intend his motion to serve as a notice of appeal." *Id.*, 595 F.2d at 569. *Smith*, however, flatly repudiated this approach:

> More importantly, the [lower] court should not have relied on Smith's reasons for filing the brief. While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, . . . the purpose of this requirement is to ensure that the filing provides sufficient notice to the other parties and the courts. . . . Thus, *the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.*

Smith v. Barry, 502 U.S. at 248-49 (emphasis added).

None of these cases supports IR's claim that the Federal Circuit exceeded its authority by treating IXYS's stay motion as a notice of appeal.

II. IXYS's Stay Motion Conveyed Adequate Notice of IXYS's Appeal

This Court has insisted that the Rules of Procedure be interpreted to fulfill their practical purpose. *Foman v. Davis*, 371 U.S. at 181-82. Notice is the purpose of a notice of appeal, and "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c)(4). *See also* the Advisory Committee note to Fed. R. App. P. 3(c) (The purpose of Rule 3 is to ensure that the other party is informed of the intent to appeal; "if a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward."); 16A Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 3d § 3949.4 ("These new provisions should . . . reduce substantially the number of appeals aborted for no reason.")

Satisfied that IXYS's motion had given IR and the district court timely notice of IXYS's appeal equivalent to that a proper notice of appeal would have provided, the Federal Circuit accepted jurisdiction and decided the merits of IXYS's case. IR has never complained that the motion failed to convey actual notice of IXYS's

appeal. Nor could it under the circumstances.[5] Instead, IR complains that the motion failed to state that the judgment "was being appealed" or that "an appeal ha[d] actually been taken," and instead merely signaled "a possible *future* appeal." This Court, however, has never drawn a distinction between appealing right now

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[5] Even before receiving IXYS's motion, IR had known IXYS would appeal the district court's September 14, 2006, judgment of infringement. First, IXYS had fiercely contested IR's allegations of infringement since the 1980's, and had successfully appealed all of the district court's prior adverse judgments entered in this case, and in the related contempt matter. *See* n.1, *supra*. Second, by written stipulation, IXYS had given up its equitable defenses to infringement in return for the assurance that IR would not interfere with its operations for a period of days after the entry of judgment. IXYS had sought this reprieve expressly to secure the time to file a motion to stay any injunction pending appeal. Third, IXYS's then-most-recent appeal from a similarly-worded judgment had been "short circuited" by the Federal Circuit's *sua sponte vacatur* before the appeal was resolved on the merits. Fourth, IXYS's counsel contacted IR's counsel in August 2006, as soon as the district court announced it would enter judgment against IXYS for the third time, and confirmed that IXYS could expect IR to abide by the stipulation not to enforce the judgment while IXYS prepared its motion for stay pending appeal. Fifth, on September 28, 2006, in accordance with the stipulation, IXYS filed a motion to stay the September 14 injunction pending appeal, a motion that, even if successful, would have been entirely futile absent an underlying appeal. In sum, IR had notice because IXYS behaved in every particular like an appealing party. Indeed, it never even came to IR's attention until IXYS moved the district court to extend the time to appeal, on October 30, 2006, that IXYS had actually failed to file a formal notice of appeal.

and appealing right soon.[6] In fact, what this Court has called for is precisely what IR suggests is inadequate: a form of notice that "specifically indicate[s] the litigant's *intent to seek* appellate review." *Smith*, 502 U.S. at 248 (emphasis added). This language plainly encompasses future action. *See also Foman v. Davis*, 371 U.S. at 181 ("Taking the two notices and the appeal papers together, petitioner's intention to seek review . . . was manifest.")

IR insists that cases such as *Smith* and *Becker v. Montgomery*, 532 U.S. 757, 767 (2001) ("imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court") do not allow courts to "excuse the failure to file a timely notice of appeal." Pet. at 5. This makes no sense at all. *Smith* and *Becker* do exactly that, in cases where *something* is filed that provides timely (as defined by Rule 4) and sufficient (as defined by Rule 3) notice of an appeal. Indeed, the Ninth Circuit (whose case law IR says must govern) has

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[6] Even if such a distinction could be sustained in the abstract, it is hard to imagine how it could be sustained as a practical matter. When has a litigant *actually taken an appeal* for IR's purposes? Obviously, one who files a formal notice of appeal must qualify. But a formal notice of appeal provides no guarantee that the filer will actually *prosecute* an appeal. Neither does it always invoke a court of appeals' present jurisdiction, as IR claims it must. A notice of appeal that is filed, for example, while any of the motions enumerated in Federal Rule of Appellate Procedure 4(A) is pending (or before one of those motions is timely filed), serves to invoke the appellate court's future jurisdiction, *i.e.*, it becomes effective only upon the district court's disposition of the motion. Fed. R. App. P. 4(B)(i).

accepted all kinds of documents as adequate to serve the function of a notice of appeal. That court has not evaluated these documents' competence to prove that a litigant "has taken an appeal," and does not merely intend to appeal. *See, e.g., Intel Corp. v. Terabyte Intern. Inc.*, 6 F.3d 614, 618 (9th Cir. 1993) (opening brief in counseled case construed as notice of appeal); *Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992) (application for certificate of probable cause to appeal construed as notice of appeal); *San Diego Comm. Against Registration and the Draft (CARD) v. Governing Bd.*, 790 F.2d 1471, 1474 (9th Cir. 1986) (motion for permission to appeal construed as notice of appeal), *abrogated on other grounds*; *NOA v. Key Futures, Inc.*, 638 F.2d 77, 78-79 (9th Cir. 1980) (stipulation to enter judgment under rule 54(b) construed as notice of appeal); *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978) (stipulation and motion requesting transfer of prior records and briefs on appeal to new appeal construed as notice of cross-appeal); *Cutting v. Bullerdick*, 178 F.2d 774, 776-777 (9th Cir. 1949) (notice of motion to stay execution construed as notice of appeal).

Finally, IR is simply mistaken when it suggests that the Federal Circuit read *Smith* so broadly as to "eviscerate the requirement for a notice of appeal whenever a post-judgment motion is filed." Pet. at 22. *Smith* plainly requires that a functional notice of appeal "specifically indicate the litigant's intent to seek appellate review." *Id.*, 502 U.S. at 248. Not every post-judgment motion conveys this intent. In fact, the Ninth Circuit explored and upheld this distinction years before *Smith* came down. In *Cel-A-Pak v. California Agricultural Labor Relations Board*, 680 F.2d 664

(9th Cir. 1982), the Ninth Circuit refused to treat a stay motion as a notice of appeal because, by the very same motion, appellant also asked the district court to rehear the case. The motion thus conveyed a jurisdictional mixed message, not the clear intent to appeal that the law requires: "The document filed by appellant and counsel's statements regarding it evince a desire to have the district court retain jurisdiction and alter its judgment rather than a desire to effectively take an appeal and thus terminate the district court's jurisdiction." *Cel-A-Pak*, 680 F.2d at 668. "This," the court went on, "distinguishe[d] *Cutting v. Bullerdick*, [*supra*,] where the [stay motion] contained no inherent ambiguity and indeed expressly stated appellants' 'desire to post a *supersedeas* bond and perfect an appeal.'"[7] *Cel-A-Pak*, 680 F.2d at 668, quoting *Cutting*, 178 F.2d at 775-776.

IXYS's stay motion contained no ambiguity similar to the one judged fatal in *Cel-A-Pak*. Indeed, IXYS had always evinced both the desire and the intent to terminate the district court's jurisdiction, and would have taken its motion directly to the Court of Appeals but for Rule 8(a)'s requirement to seek a stay in the first instance from the district court. The Federal Circuit

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[7] The Eleventh Circuit has easily made this same distinction. *Compare Harris v. Ballard*, 158 F.3d 1164, 1166 (11th Cir. 1998) (combined motion for extension of time not constructive notice of an appeal because it "indicates uncertainty as to whether the party will in fact appeal and compels the conclusion that the notice of appeal is something yet to be filed") *with Rinaldo v. Corbett*, 256 F.3d 1276, 1279 (11th Cir. 2001) (appellant's motion for extension of time "stated unequivocally that he did intend to appeal.")

correctly held that IXYS's motion provided adequate notice of an appeal under Rule 3. Pet. Appx. 6a-7a. IR has never disputed that the motion was timely filed under Rule 4. The law requires nothing more.

III. This Court's Decisions in *Torres* and *Bowles* Do Not Govern This Case

IR tries to suggest that this Court's decisions in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) and *Bowles v. Russell*, 551 U.S. __, 127 S. Ct. 2360 (2007), both sustaining orders of dismissal, govern this case. But *Torres* and *Bowles* actually have little to do with this case, and both are in perfect harmony with the Federal Circuit's decision here. Those cases each discuss the scope of the federal courts' discretion to waive the requirements of Rules 3 and 4. (Indeed, all of this Court's cases in this area can be viewed as explaining the difference between curable lapses in form and true jurisdictional impediments to appeal.) In *Torres*, the question presented was whether the court of appeals could assert jurisdiction over an "appellant" who was not named in the notice of appeal. The Court held, not surprisingly, that the requirement set forth in Rule 3(c) that a notice of appeal "specify the party or parties taking the appeal" was mandatory. *Id.*, 487 U.S. at 314 ("The failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal."). IXYS's motion for a stay pending appeal, in contrast to the deficient notice of appeal in *Torres*, permitted no uncertainty as to the identity of the appealing party.

In *Bowles*, the question was whether the district court was empowered to extend the time limit to appeal beyond the period allowed by statute. This Court, applying a straightforward separation-of-powers analysis, concluded it could not. This result, like that reached in *Torres*, was also unsurprising, since the Court had "long ago held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Id.*, 127 S.Ct. at 2363, quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (*per curiam*). Here, IXYS's motion was filed fourteen days after judgment was entered, well within the thirty days Congress has allowed by statute. Applying both *Torres* and *Bowles*, the Federal Circuit was comfortably within its authority when it accepted IXYS's motion as a functional notice of appeal.

IV. The Federal Circuit's Decision Is In Harmony With Those Of The Other Circuits

IR asserts that the Federal Circuit's decision in this case brings its law into conflict with that of other circuits. But this, too, is untrue. None of the cases IR reels off is apposite here. In *Williams v. Chater*, 87 F.3d 705 (5th Cir. 1996), the hopeful appellant asked the Fifth Circuit to construe an opening brief as a notice of appeal. The problem was that the brief was untimely filed, almost 60 days after the entry of judgment. In *Isert v. Ford Motor Co.*, 461 F.3d 756 (6th Cir. 2006), the motion the Iserts argued should stand in for a notice of appeal "gave no indication which judgment (among many) [they] wished to appeal." *Id.*, 461 F.3d at 763. The same problem doomed the would-be appellant in *Faysound Ltd. v. Falcon Jet Corp.*, 940 F.2d 339, 342 (8th Cir. 1991)

("Looking past the fact that Fuller's supposed notices were filed in the wrong court, and reading those papers generously, Fuller's pleadings are still insufficient: they do not specify . . . the judgment being appealed from"). In *Van Wyk El Paso Inv., Inc. v. Dollar Rent-A-Car Systems, Inc.*, 719 F.2d 806 (5th Cir. 1983), the Fifth Circuit refused to treat a Form for Appearance of Counsel as a notice of appeal because the Form "fail[ed] to indicate whether Dollar Rent-a-Car is appellant or appellee [and did] not refer to the final order of the trial court which is the subject of the appeal." *Id.*, 719 F.2d at 808. In *Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227 (1st Cir. 2007), the purported appellants urged that their check paying the filing fee should serve as a notice of cross-appeal. The First Circuit refused because the payment did not give the opposing party notice of an appeal, as the check itself was not a filing in the record, no cover letter accompanied the check, and the docket memorialized the payment of the fee, but did not indicate a notice of cross-appeal. *Id.*, 494 F.3d at 233. None of these results is surprising, and none conflicts with the result the panel reached in this case.

Ninth Circuit law gets IR no farther. The Ninth Circuit has held that "[t]he principles outlined in *Smith v. Barry* . . . are not confined to the filings of *pro se* appellants.'" *S.M. v. J.K.*, 262 F.3d at 922, quoting *Rodgers*, 205 F.3d at 1205. In keeping with *Smith*, as discussed above, the Ninth Circuit has allowed various documents to serve as constructive notices of appeal, whether filed by *pro se* or counseled parties. Even before *Smith*, that court indicated a willingness to recognize functional notices of appeal in counseled cases in "extraordinary circumstances." *Hollywood*, 886 F.2d at 1232.

Since *Smith*, it has suggested it will do so if given a "reason." *S.M. v. J.K.*, 262 F.3d at 922, 923.

IXYS presented the Federal Circuit with ample reason to exercise its discretion. First and foremost, IXYS outlined the convergence of unusual and unfortunate circumstances that resulted in its inadvertent failure to file a formal notice of appeal within thirty days after entry of the district court's judgment on September 14, 2006. In brief, a trusted litigation secretary was distracted from calendaring the last day to file, first by the more pressing deadline imposed by the stipulation to file a motion to stay the injunction in the district court, and then as the October 16 deadline to appeal approached and passed, by a diagnosis of cancer culminating in her surgery on October 30, 2006.[8] Second, the circumstances surrounding this appeal (outlined in footnote 5, *supra*) as well as IXYS's timely motion provided IR not just adequate but ample notice of IXYS's intention to appeal. Third, the September 2006 judgment was virtually identical to the February 2006 judgment for which IXYS *had* filed a formal notice of appeal. (The February 2006 judgment had been spontaneously vacated and remanded by the Federal Circuit for reconsideration in light of *eBay v.MercExchange*.) Fourth, IR can claim no prejudice whatsoever from IXYS's lapse. Indeed, IR's only prejudice is that the court of appeals' treating IXYS's

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[8] Recognizing that "[i]n the modern world of legal practice, the delegation of repetitive legal tasks has become a necessary fixture," the Ninth Circuit has held that "delegation of the task of ascertaining [a] deadline [i]s not *per se* inexcusable neglect." *Pincay v. Andrews*, 389 F.3d 853, 856 (9th Cir. 2004) (*en banc*).

motion as a notice of appeal avoided the abrupt termination of this case. But depriving IR of that "quick victory" is insufficient to justify the denial of relief to IXYS. *See Pratt v. Philbrook*, 109 F.3d 18, 22 (11th Cir. 1997).

CONCLUSION

More than forty-five years ago, this Court wrote:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. . . . The rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

Foman v. Davis, 371 U.S. at 181-182 (internal quotations and case citations omitted).

IXYS's motion for stay pending appeal was timely and provided all the information a formal notice of appeal must provide. By asserting jurisdiction and deciding this case on the merits, the Federal Circuit did exactly what the Federal Rules require and this Court has mandated time and again. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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